

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

MARCH 30, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Vienna Sausage Manufacturing Company

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Serial No. 74/414,871

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Fred S. Lockwood of Lockwood, Alex, Fitzgibbon & Cummings  
for Vienna Sausage Company.

Darlene Bullock, Trademark Examining Attorney, Law Office  
101 (Chris Wells, Managing Attorney).

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Before Cissel, Walters and Wendel, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 21, 1993, applicant filed an application to  
register the mark "BIG FOOT" on the Principal Register for  
"wieners," in Class 29. The application was based on  
applicant's assertion that it possessed a bona fide  
intention to use the mark in commerce. Registration was  
refused under Section 2(d) of the Act on the ground that  
applicant's mark, if it were used on wieners, would so

resemble mark "BIGFOOT," which is registered<sup>1</sup> for "retail convenience store services," in Class 42, that confusion would be likely.

There was another potential problem with the application. It was suspended until two prior-filed applications were abandoned, but eventually, a final refusal was issued by the Examining Attorney based on likelihood of confusion with the above-referenced registration.

Applicant filed a timely Notice of Appeal, and then filed an appeal brief. The Examining Attorney filed her brief. Applicant did not request an oral hearing before the Board.

The sole issue before the Board in this appeal is whether confusion would be likely if applicant used its mark on wieners. Based on the record in this application, we hold that it would be, and we therefore affirm the refusal to register.

The test to be applied in resolving the question of whether confusion is likely was enunciated by our primary reviewing court in *In re E. I. duPont de Nemours & Co.*, 476

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<sup>1</sup> Reg. No. 1,553,316, issued on the Principal Register on August 22, 1989 to Johnson Oil Company. Combined affidavit under Sections 8 and 15 accepted in 1995.

F.2d 1357, 177 USPQ 563 (CCPA 1973). Of the thirteen factors identified by the court as proper for consideration in determining the propriety of a Section (2)(d) refusal, the record in the application at hand presents evidence regarding the similarities between the marks and the relationship between the goods and services set forth in the application and registration, respectively, including the channels of trade in which they are sold and rendered, and the potential customers of applicant's products and registrant's services.

Applicant apparently concedes that the marks are similar. In any event, they differ only in that applicant's "BIG FOOT" mark is presented with a space between the two component words, whereas the registered mark is one term, "BIGFOOT." Confusion would plainly be likely if these marks were used in connection with closely related goods and services.

This appeal therefore turns on whether confusion would be likely if these virtually identical marks were to be used with both applicant's goods and registrant's services. Applicant does not dispute that applicant's goods will be sold through the normal channels of trade for wieners, which, applicant also concedes, include retail convenience stores, where ordinary consumers will purchase them.

Applicant does dispute, however, the Examining Attorney's conclusion that confusion would be likely if applicant's goods, bearing applicant's "BIGFOOT" mark, were sold in convenience stores which are operated under registrant's "BIG FOOT" mark.

Applicant argues that the Examining Attorney's holding that confusion would be likely if erroneous because, according to applicant, "While convenience store customers may be exposed to quite a wide range of products, most will be national or well known brands ... If a convenience store handles wieners[,] they will most likely be Oscar Meyer or [an]other national brand... and that, whereas some large chain supermarkets may handle a few large volume items under their own 'house' brands, such is not the case for convenience stores[,] which by reason of their size[,] will stock only familiar leading brands[,] since they do not have sufficient volume to justify house brands. Therefore, (1) there is no appreciable likelihood that a registrant's BIGFOOT convenience store will have its own house brand of any product[,] and (2) if it has a house brand[,] there is little likelihood that it will have house brand wieners." (brief, p.7)

The problem we have with applicant's argument is that it is not supported by anything in the record. The only

evidence of record in this appeal, besides the application and the cited registration, is the evidence the Examining Attorney submitted, which consists of a large number of excerpts from published articles retrieved from the Nexis® database of periodical publications. All these excerpts establish is a fact that applicant has conceded anyway, that convenience stores sell wieners.

Applicant in essence asks the Examining Attorney and the Board to take judicial notice of marketing practices applicant contends exist in the convenience store industry with respect to merchandise bearing national brands and house brands, and to accept, without any evidence whatsoever, that the ordinary consumers who constitute the purchasers and potential purchasers of applicant's goods in registrant's convenience stores would not be confused by the use of the same mark on both the storefront and wieners sold inside the store because they are aware of the merchandising practices in the convenience store industry.

Simply put, these are not the kinds of facts of which the Board may take judicial notice under Rule 201 of the Federal Rules of Evidence. They are "subject to reasonable dispute," and are not "generally known within the territorial jurisdiction of the trial court" or "capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Because applicant's assertions concerning the marketing practices in the convenience store industry do not fall into the class of facts of which the Board may take judicial notice, applicant needed to establish them with evidence, but applicant did not introduce any evidence in support of its argument. We are left with the established facts that the marks are almost identical and that the goods set forth in the application are likely to be sold to the same purchasers in stores that are identified by the same mark that is used to identify the source of the goods. Under these circumstances, confusion would clearly be likely.

Accordingly, the refusal to register is affirmed.

R. F. Cissel

C. E. Walters

H. R. Wendel  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

**Ser No.** 74/414871